Supreme Court, U.S.
FILED
SEP 23 2005
OFFICE OF THE CLERK

No. 04-1264

In The
Supreme Court of the United States
October Term, 2005

BUCKEYE CHECK CASHING, INC.,
Petitioner,
v.

JOHN CARDEGNA, et al.,
Respondents.

On Petition For Writ of Certiorari To the Florida Supreme Court

BRIEF OF FLORIDA, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, DISTRICT OF COLUMBIA, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KENTUCKY, MAINE, MARYLAND, MASSACHUSETTS, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEVADA, NEW HAMPSHIRE, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OHIO, OREGON, PENNSYLVANIA, PUERTO RICO, RHODE ISLAND, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, WASHINGTON, WEST VIRGINIA, WISCONSIN, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED (RESTATED)

Whether the Federal Arbitration Act compels a State to enforce an arbitration clause embedded in an agreement that is criminally illegal under the laws of the State in which it was entered, in direct contravention of that State's established public policy.

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INTEREST OF *AMICI CURIAE*

The States have a compelling interest in protecting the system of dual sovereignty created by the Constitution. To preserve the federalist system, the States must retain their identity as separate sources of governmental power and remain free to adopt consumer protection laws. To that end, the States' legitimate public policy determinations that certain illegal agreements are void as to all terms must be respected.

The Federal Arbitration Act ("FAA"), as interpreted by this Court in *Southland Corp. v. Keating*, 465 U.S. 1 (1984), and by the circuit courts that have addressed the issue in purportedly following *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967), has dramatically eroded the States' sovereign power. The Court in *Southland* transformed the FAA from a procedural statute applicable only in federal courts into a "Federal bludgeon to force . . . individual State[s] into . . . unwilling submission to arbitration enforcement." *See Joint Hearings on S. 1005 and H.R. 646 before the Subcommittees of the Committees on the Judiciary*, 68th Cong. 40 (1924) (testimony of Julius Cohen, principal drafter of the FAA, *assuring Congress that the FAA would not do this*). The circuit courts, in purportedly following *Prima Paint*, have abandoned even the pretext of federalism and eliminated the States' ability to have their courts declare certain contracts illegal.

In this brief, forty States, through their Attorneys General, ask this Court to (1) overturn *Southland*, which has been recognized, almost universally, as wrongly decided, and (2) respect principles of federalism by halting the expansion of *Prima Paint*.

SUMMARY OF THE ARGUMENT

A majority of Justices of this Court have recognized, along with virtually every legal scholar that has written on the subject, that Congress never intended for the FAA to apply in state court proceedings. Congress intended the FAA to be nothing more than a procedural statute designed to reverse the common law antipathy for arbitration agreements as it existed in early twentieth century federal courts. Because the Congress that enacted the FAA did not intend for it to have preemptive effect, *Southland* is clearly wrong.

This Court has held repeatedly that when Congress seeks to preempt state law in a field traditionally occupied by the States, it must evince an intention to do so in unmistakably clear language. Not only is the FAA itself devoid of any clear preemptive language, but the legislative history preceding enactment of the FAA indicates the opposite—that Congress never suspected the FAA would apply in state courts or preempt arguably inconsistent state law.

Nothing in the FAA supports the notion that Congress intended to dictate to States when and how they can make their courts available to hear state law contract disputes. Assuming Congress relied on its commerce power when it enacted the FAA and intended to create substantive federal rights, the commerce power merely authorizes Congress to regulate interstate commerce directly—it does not authorize Congress to regulate state governments' regulation of interstate commerce. Accordingly, to the extent *Southland* holds to the contrary, it should be overruled.

Stare decisis is an inadequate justification for retaining *Southland* due to the injury it causes the States. *Southland* forces the States to rigorously enforce arbitration clauses, and precludes

the States from carving out limited public policy exceptions to the ambiguous "national policy favoring arbitration."

Even if *Southland* is retained notwithstanding the overwhelming evidence of its shortcomings, the decision of the Florida Supreme Court should be affirmed because nothing in *Southland* or *Prima Paint* precludes the States from refusing to enforce arbitration clauses embedded in criminally illegal agreements. States are free to regulate arbitration clauses under general contract law principles, and States may invalidate arbitration clauses "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The "making of [an] agreement for arbitration" is clearly at issue when it is embedded in a criminally illegal agreement. Nothing in the FAA, *Southland*, or *Prima Paint* was intended to undermine the States' sovereign right to nullify criminally illegal contracts *in toto*. States have a compelling interest in protecting their citizens from predatory lending and other unscrupulous business practices. The freedom of contract principles that govern most private agreements must yield to countervailing state public welfare laws, at least to the extent those laws do not discriminate against arbitration.

Finally, the source of the *Prima Paint* separability rule, the "making of the agreement for arbitration" language in section 4, was only intended to apply in federal court proceedings. This Court should not use the theory of "section 2" preemption announced in *Southland* to bootstrap the procedural provisions of the FAA in contravention of their plain and unambiguous meaning.

ARGUMENT

I. *Southland* should be overruled.

a. *Southland* is irreconcilable with the otherwise well-settled "clear statement" rule.

The Constitution creates a system of dual sovereignty in which the States retain substantial sovereign authority. *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). While the Supremacy Clause, U.S. Const., art. VI, cl. 2, permits Congress to impose its will on the States when acting pursuant to its enumerated powers, this Court has described this as "an extraordinary power in a federalist system" that "[the Court] must assume Congress does not exercise lightly." *Id.* at 460. In light of the respect for state sovereignty implicit in the structure of the Constitution, this Court has repeatedly followed the rule of statutory construction that "if Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Id.* at 460 (citing *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985)), *quoted in Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989); *see Raygor v. Regents of the Univ. of Minn.*, 534 U.S. 533, 543 (2002) (quoting *Will*); *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 787 (2000) (same); *see also Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

Southland is a conspicuous exception to this otherwise well-settled "clear statement" rule. The *Southland* majority candidly described the legislative history surrounding the FAA as "not without ambiguities." *Southland*, 465 U.S. at 12; *compare, e.g., Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146-147 (1963) ("We are not to conclude that Congress legislated the ouster of this [state] statute . . . in the absence of an unambiguous congressional mandate to that effect."). In dissent, Justice O'Connor, joined by then-Justice Rehnquist, concluded

that the legislative history was unambiguous and "establish[d] conclusively that the 1925 Congress viewed the FAA as a procedural statute, applicable only in federal courts." *Southland*, 465 U.S. at 25 (O'Connor, J., dissenting).

At varying times, seven of the eight Justices sitting on this Court, along with former Chief Justice Rehnquist, have written or joined in opinions recognizing that "FAA preemption" is, in the words of Justice O'Connor, "unfaithful to congressional intent," *id.* at 36, and thus based only loosely on the actual FAA. Justice Stevens, joined by Justices Ginsburg, Breyer, and Souter, wrote in dissent in *Circuit City Stores v. Adams*, 532 U.S. 105 (2001), that "the Court's interpretation of the [FAA] has given it a scope far beyond the expectations of the Congress that enacted it." *Id.* at 132 (Stevens, J., dissenting). As Justice Stevens recognized in his dissent in *Perry v. Thomas*, 482 U.S. 483 (1987), "[i]t [was] only in the last few years that the Court ha[d] effectively rewritten the [FAA] to give it a pre-emptive scope that Congress certainly did not intend." *Id.* at 493 (Stevens, J., dissenting). Justice Thomas, joined by Justice Scalia, dissented in *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 263 (1995), principally on the bases identified by Justice O'Connor in her dissent from *Southland*. *Id.* at 285-93 (Thomas, J., dissenting); *see also id.* at 284 (Scalia, J., dissenting) ("I agree with the respondents (and belatedly with Justice O'Connor) that *Southland* clearly misconstrued the Federal Arbitration Act."). These opinions make clear that the *Southland* majority itself, along with, at varying times, at least seven of the eight Justices of the present Court, did not believe that anything in the FAA makes "unmistakably clear" that Congress intended to apply the FAA to the States.[1]

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[1] David S. Schwartz, *Mandatory Arbitration: Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, 67 Law & Contemp. Prob. 5, 6 (2004) ([I]t may be that no Justice on th[is] Court believes *Southland* was correctly decided . . . ").

The premise of *Southland* is that the FAA was an exercise of Congress's power to enact substantive federal law under the Commerce Clause. *Southland*, 465 U.S. at 11-12. Relying on Justice Black's dissent in *Prima Paint*, the Court observed that when Congress creates substantive rules of federal law pursuant to its commerce power, "it normally creates rules that are enforceable in state as well as federal courts." *Id.* at 12 (citing *Prima Paint*, 388 U.S. at 420 (Black, J., dissenting)). The two principal problems with this premise are (1) Congress never intended the FAA to create substantive rules of federal law; and (2) Congress did not rely on its commerce power, at least not principally, when it enacted the FAA.

As Justice O'Connor observed in her *Southland* dissent, "[o]ne rarely finds a legislative history as unambiguous as the FAA's. That history establishes conclusively that the 1925 Congress viewed the FAA as a procedural statute, applicable only to federal courts, derived, Congress believed, largely from the federal power to control the jurisdiction of the federal courts." *Southland*, 465 U.S. at 25 (O'Connor, J., dissenting). The consensus, near universal view of scholarly commentary is that Justice O'Connor was right.[2] *Cf. Camps*

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[2] *See, e.g.*, Scott J. Burnham, *The War Against Arbitration in Montana*, 66 Mont. L. Rev. 139, 200 (2005) ("Let's start with the widely shared premise that the U.S. Supreme Court took a wrong turn in *Southland v. Keating*. It should never have held that the Federal Arbitration Act is applicable to the states."); Stephen L. Hayford & Alan R. Palmiter, *Arbitration Federalism: A State Role in Commercial Arbitration*, 54 Fla. L. Rev. 175, 192 (2002) ("[T]he Court [in *Southland*] chose to remake jurisdictional history, transporting the jurisdictionally cautious 1925 statute into the rich post-New Deal jurisdictional environment. . . . In remaking history, the Court had made law. Nowhere is the declaration of a 'national' policy-as opposed to the 'federal' policy discerned a year earlier in *Moses Cone* to be found in the text of the statute, its legislative history, or the contemporary apologia of the Act's sponsors.") (footnotes omitted); Nancy R. Kornegay, Comment, *Prima Paint to First Options: The Supreme Court's Procrustean Approach to the Federal Arbitration Act and Fraud*, 38 Hous. L. Rev. 335, 338 (2001) (arguing that overruling *Southland* "will correct [the Court's] course to once again be in

Newfound/Owatonna v. Town of Harrison, 520 U.S. 564, 591 (1997) (recognizing relevance of scholarly commentary in declining to depart from subsidy/credit distinction in dormant Commerce Clause jurisprudence). According to Professor David S. Schwartz, who was counsel of record for the twenty-five law professors that urged the Court to overrule *Southland* as *amici curiae* in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003),[3] "[t]he historical record clearly shows that the FAA was intended to be a procedural statute for the federal courts, that it was not intended to preempt state law, and that it was designed to reverse the [common law theory that arbitration was an 'ouster

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harmony with both the original legislative intent of the FAA and the traditional doctrine of federalism that has allowed states to adjudicate contracts within their own boundaries"); Ian R. Macneil, Federal Arbitration Law § 10.5.3 (1994) (referring to the "pillar" of legislative history supporting *Southland* as "truly a pillar of sand"); Larry J. Pittman, *The Federal Arbitration Act: The Supreme Court's Erroneous Statutory Interpretation, Stare Decisis, and a Proposal for Change*, 53 Ala. L. Rev. 789, 863-74 (2002) (urging the Court to reexamine *Southland* due to the paucity of sources supporting the majority decision and the wealth of sources supporting Justice O'Connor's dissent); Schwartz, *supra*, note 1, at 5 (2004) ("[*Southland*] transformed a quaint, sixty-year-old procedural statute into a permanent, unauthorized eviction of state-court power to adjudicate a potentially large class of disputes, as well as an eviction of state lawmaking power over the traditional state domain of contract law.") (footnote and internal quotation omitted); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 Wash. U. L. Q. 637, 701 (1996) ("It is time for the Supreme Court to reassess its extreme preference for mandatory binding arbitration over litigation, and to replace its current preference with the more limited acceptance of binding arbitration initially intended by Congress when it enacted the FAA."); Jack Wilson, *"No-Class-Action Arbitration Clauses," State-Law Unconscionability, and the Federal Arbitration Act: A Case for Federal Judicial Restraint and Congressional Action*, 23 Quinnipiac L. Rev. 737, 747 (2004) (commenting that *Southland* "should be taken as a given" because of the Court's reticence in the face of constant criticism, and thus "there is little to gain by extensively rehashing the FAA's legislative history to once again show that the *Southland* majority was wrong and Justice O'Connor's *Southland* dissent was right").

[3] Brief of Law Professors as Amici Curiae in Support of Respondents, *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003) (No. 02-634).

of jurisdiction'] but otherwise preserve all applicable state contract law." Schwartz, *supra* note 1, at 8 (footnote omitted). "The idea that the FAA would apply in state courts or preempt state law was beyond the contemplation of Congress; it simply did not arise in the legislative history of the Act." *Id.* at 18. According to Professor Ian Macneil, author of the leading scholarly account of the FAA's legislative history,[4] that history is the only "pillar supporting *Southland*," and "[i]t is truly a pillar of sand." Macneil, *supra* note 2, § 10.5.3.

The legislative history is replete with examples of the nonsubstantive nature of the FAA. The House Report accompanying the act stated:

> Whether an agreement for arbitration shall be enforced or not *is a question of procedure* to be determined by the law court[5] in which the proceeding is brought *and not one of substantive law* to be determined by the law of the forum in which the contract is made. Before such contracts could be enforced in the Federal Courts, therefore, this law is essential. *The bill declares that such agreements shall be recognized by the courts of the United States.*

H.R. Rep. No. 68-96, at 1 (1924) (emphasis added). After describing the need for the law, the report reiterates: "The bill declares simply that such agreements for arbitration shall be enforced, *and provides a procedure in the Federal Courts for their enforcement.*" *Id.*, at 2 (emphasis added).

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[4] Ian R. Macneil, American Arbitration Law 92-121 (1992); *see id.* at 106 ("[A]ny idea that section 2 is somehow independent of the remaining sections, that it creates its own system of independent regulation separate from the remaining sections is a historical absurdity."). Only a handful of examples from this extensive legislative history are included in this brief.

[5] The report's reference to "law court" was probably a typographical error intended to read "law of the court." Schwartz, *supra* note 1, note 90.

The report also acknowledges that the bill was drafted and sponsored by a committee of the American Bar Association (the "ABA"), *id.*, at 1, and an article by that ABA committee, published in the ABA Journal contemporaneously with the FAA, made the point even more explicitly:

> A Federal statute providing for the enforcement of arbitration agreements does relate solely to procedure of the Federal courts. It is no infringement upon the right of each State to decide for itself what contracts shall or shall not exist under its laws. To be sure whether or not a contract exists is a question of the substantive law of the jurisdiction wherein the contract was made. But whether or not an arbitration agreement is to be enforced is a question of the law of procedure and is determined by the law of the jurisdiction wherein the remedy is sought.

W.H.H. Piatt, et al., *The United States Arbitration Law and Its Application*, 11 A.B.A.J. 153, 154-55 (1925); *accord* Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 Va. L. Rev. 265, 275-76 (1926).

Moreover, Congress's authority to enact the FAA, according to its drafters, did not rest solely on Congress's commerce and admiralty powers:

> The statute establishes a procedure in the Federal courts for the enforcement of arbitration agreements. It rests upon the constitutional provision by which Congress is authorized to establish and control inferior Federal courts.

Id. at 154; Cohen & Dayton, *supra*, at 275.

Julius Cohen, a principal drafter of the act, explained in a 1926 law review article that "[t]he primary purpose of the statute is to make enforceable in the Federal courts such agreements for

arbitration, and for this purpose Congress rests solely upon its power to prescribe the jurisdiction and duties of the Federal Courts." Cohen & Dayton, *supra*, at 277-78. Cohen made this same point in his testimony before the House and Senate, explaining to Congress that the act was "[an] exercise of your power to confer jurisdiction on the Federal courts." *Joint Hearings on S. 1005 and H.R. 646 before the Subcommittees of the Committees on the Judiciary*, 68th Cong. 17 (1924) ("Joint Hearings"), *quoted in Prima Paint*, 388 U.S. at 420 n.21 (Black, J., dissenting). Cohen explained to Congress: "The theory on which you do this is that you have the right to tell the Federal courts how to proceed," *Id.*

Cohen also testified that the act had no federalism implications, assuring Congress that

> it [cannot] be said that the Congress of the United States, *directing its own courts . . .* , would infringe upon the provinces or prerogatives of the States. . . . The question of the enforcement relates to the law of remedies and not to substantive law. The rule must be changed for the jurisdiction in which the agreement is sought to be enforced . . . . *There is no disposition therefore by means of the Federal bludgeon to force an individual State into an unwilling submission to arbitration enforcement.*

Id., at 39-40 (emphasis added), *quoted in Prima Paint*, 388 U.S. at 420 n.23 (Black, J., dissenting).

The absence of congressional acknowledgment of its supposed intent to preempt state law is also telling. *See* Schwartz, *supra* note 1, at 23-26 (describing how Congress explicitly recognized preemptive effect of contemporary legislation, and discussing the unlikelihood that Congress intended to overrule *sub silentio Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109 (1924)). The Senate Report recognizes that

the arbitration bill "follow[ed] the lines" of New York's arbitration statute that had been "sustained by the decision of the Supreme Court of the United States in the matter of the *Red Cross Line v. Atlantic Fruit Co.*" S. Rep. No. 68-536, at 3 (1924). *Red Cross Line*, which had been decided earlier that year, held that the New York arbitration law was a procedural statute, and thus that New York State courts could apply the act in admiralty cases. *Red Cross Line*, 264 U.S. at 124 ("The Arbitration Law deals merely with the remedy in the state courts in respect of obligations voluntarily and lawfully incurred. It does not attempt either to modify the substantive maritime law or to deal with the remedy in courts of admiralty."). While acknowledging, favorably, the New York statute and *Red Cross Line*, the Senate report conspicuously fails to mention "that the New York law would be preempted, that *Red Cross Line* would become a nullity, or that the Senate disagreed with the Court's conclusion that arbitration is a matter of remedy and not substantive law – let alone that Congress might be overruling *Red Cross Line*." Schwartz, *supra* note 1, at 25.

The FAA's legislative history demonstrates conclusively that the act was never intended to have any application in state court proceedings,[6] and it certainly was never intended to

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[6] Petitioner represents "this case . . . calls for this Court to vindicate federal arbitration rights against the very hostility that motivated the FAA in the first place." Brief For Petitioner, at 2; *see id.*, at 17 ("[T]he Florida Supreme Court's . . . approach reflects the very hostility to arbitration that the FAA was adopted to counteract."); *see also* Brief of Financial Service Centers of America, Inc., et al. as *Amici Curiae* in Support of Petitioner, at 9 (chalking up the Florida Supreme Court's decision to "residual antipathy to arbitration"). In light of the clear and unambiguous legislative history, Petitioner's allusion to Congress's original intent is manifestly and demonstrably erroneous. What this Court is really called on to do in this case is to cabin its own "national policy favoring arbitration," which has supplanted the FAA. Contrary to Petitioner's representations, "Florida public policy favor[s] resolving disputes through arbitration when the parties have agreed to do so." *Orkin Exterminating Co. v. Petsch*, 872 So. 2d 259, 263 (Fla. 2d DCA 2004), *rev. denied*, 884 So. 2d 23 (Fla. 2004); *accord, e.g.*, *KFC Nat'l*

supplant state substantive law. *See, e.g.*, Schwartz, *supra* note 1, at 8 ("If original congressional intent is the touchstone of a statute's preemptive effect, *Southland* was plainly wrong."). Yet the FAA's legislative history, and the Court's prior constructions of that history, were the only bases on which *Southland* was decided. According to Chief Justice Burger, "[t]o confine the scope of the Act to arbitrations sought to be enforced in federal courts would frustrate what we believe Congress intended to be a broad enactment appropriate in scope to meet the large problems Congress was addressing." *Southland*, 465 U.S. at 14. The dearth of any evidence of congressional intent to displace state law demonstrates clearly that *Southland* has nothing to do with "the FAA," unless "the FAA" has nothing to do with original congressional intent.

Accordingly, it was this Court in *Southland*, and not anything remotely attributable to Congress, that "withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *See Southland*, 465 U.S. at 10. Because the question of whether state action is preempted by a federal statute necessarily depends on congressional intent, *see, e.g.*, *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 137-38 (1990), *Southland* was not only wrong when it was decided—it cannot be sustained under any other rationale.

b. Congress never intended for the FAA to conscript state judicial proceedings.

The construction of the FAA adopted by this Court in *Southland* constitutes "a permanent . . . eviction of state-court power to adjudicate a potentially large class of disputes." *Allied-*

Mgmt. Co. v. Beauregard, 739 So. 2d 630, 631 (Fla. 5th DCA 1999). In fact, Florida has enacted a comprehensive arbitration code, which, mirroring section 2 of the FAA, declares most arbitration agreements "shall be valid, enforceable, and irrevocable without regard to the justiciable character of the controversy." § 682.02, Fla. Stat. Virtually every other state has enacted similar legislation. *See infra* note 12.

Bruce, 513 U.S. at 284-85 (Scalia, J., dissenting). If *Southland* is correct, the 1925 Congress issued a general directive to state courts, compelling them to invariably enforce arbitration provisions embedded in commercial contracts without regard to countervailing state policy concerns. But there is no basis to conclude Congress intended to conscript state judicial systems in this manner.

Nothing in the Constitution grants Congress the power to control state court dockets or, more specifically, to force state courts to compel arbitration in cases that arise exclusively under state law. To the contrary, "[t]he general rule bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them." *Howlett v. Rose*, 496 U.S. 356, 372 (1990) (internal quotations omitted) (citing *Southland*, 465 U.S. at 33 (O'Connor, J., dissenting)), *quoted in Johnson v. Fankell*, 520 U.S. 911, 919 (1997) (quoting *Howlett v. Rose*, 496 U.S. 356, 372 (1990)) (internal quotation omitted). "The States thus have great latitude to establish the structure and jurisdiction of their own courts." *Johnson*, 520 U.S. at 919 (quoting *Howlett*, 496 U.S. at 372). Further, "the procedure by which rights may be enforced and wrongs remedied is peculiarly a subject of state regulation and control." *Hardware Dealers Mut. Fire Ins. Co. v. Glidden Co.*, 284 U.S. 151, 158 (1931) (holding that Minnesota statute requiring arbitration of fire insurance disputes did not violate due process); *see also Bronson v. Kinzie*, 42 U.S. 311, 315 (1843) ("[A] state may regulate at pleasure the modes of proceeding in its courts in relation to past contracts as well as future. . . . ").[7]

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[7] This court has, of course, held that state courts must hear claims raising questions of substantive federal law by virtue of the Supremacy Clause. U.S. Const., art. VI, cl. 2; *see Testa v. Katt*, 330 U.S. 386, 389 (1947). However, "[a] congressional directive to change a state court procedure is not simply a command to apply existing state judicial resources to enforce a federal right, but a directive to state courts to regulate persons in the state – litigants – in a particular way." David S. Schwartz, *The Federal Arbitration Act and the*

Congress has not federalized commercial obligations, or even arbitration provisions within commercial obligations. Arbitration provisions remain creatures of state contract law, subject to the principles governing all contracts within the relevant jurisdiction. *Allied-Bruce*, 513 U.S. at 281 ("States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of *any* contract.'").

Moreover, as the *Southland* majority recognized, Congress did not create a federal forum for violations of arbitration provisions. *Southland*, 465 U.S. at 16 n.9 ("[Section two of the FAA] does not create any independent federal-question jurisdiction under 28 U.S.C. § 1331 or otherwise."); *see also Allied-Bruce*, 513 U.S. at 291 (Thomas, J., dissenting) ("[I]f § 2 really was understood to 'create federal substantive law requiring the parties to honor arbitration agreements,' then the breach of an arbitration agreement covered by § 2 would give rise to a federal question within the subject-matter jurisdiction of the federal district courts.") (citation omitted).

"The Commerce Clause . . . authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce." *New York*, 505 U.S. at 166, *quoted in Printz*, 521 U.S. at 924; *see* Schwartz, *supra* note 7, at 542, 620 ("FAA preemption is nothing more or less than procedural regulation of state courts, and . . . Congress lacks the power to regulate procedures in state courts. . . . . [R]elying on the commerce power does not justify the unconstitutional assertion of power to commandeer state courts by dictating procedures to them."). Congress could therefore never have intended this result. To the extent *Southland* holds otherwise, it is incorrect.

Power of Congress over State Courts, 83 Ore. L. Rev. 541, 581 (2004).

c. *Stare decisis* is not a sufficient justification for retaining *Southland* in light of its dramatic impact on State sovereignty.

The doctrine of *stare decisis*, although essential to the stability of the law as a general matter, "is not . . . an inexorable command." *Lawrence v. Texas*, 539 U.S. 558, 577 (2003); *see also, e.g.*, *State Oil Co. v. Khan*, 522 U.S. 3, 20-21 (1997); *Agostini v. Felton*, 521 U.S. 203, 236-37 (1997); *Seminole Tribe v. Florida*, 517 U.S. 44, 63 (1996); *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). "When governing decisions are unworkable or are badly reasoned, this Court has never felt constrained to follow precedent." *Payne*, 501 U.S. at 827 (internal quotation omitted), *quoted in Seminole Tribe*, 517 U.S. at 63.

As explained above, *Southland* is as badly reasoned as it is irreconcilable with the otherwise consistent line of cases that establish the level of respect that must be accorded to the States as sovereigns when the Court considers the preemptive scope of a federal statute. Moreover, the policy underpinning *stare decisis* should be at its weakest when the wrongly decided case results in a dramatic erosion of State power.

The injury to State sovereignty attributable to *Southland* cannot be overstated, as this case aptly demonstrates. Petitioner seeks to compel the Florida courts to enforce a provision in an agreement that is facially criminal under Florida law. This dramatic affront to state sovereignty will have devastating affects on the States' ability to protect their citizens from predatory lending and other unscrupulous business practices. Moreover, the injury to the States is in no way lessened by the legal fiction that the arbitration provision, although inarguably embedded in the criminal agreement, is separable as a matter of federal law. Rather, if adopted by this Court, it will only highlight how powerless the States are to preclude enforcement of criminally illegal agreements.

Respondents' Complaint alleges that Petitioners were in the business of making consumer loans under the guise of a "check cashing" scheme, Joint Appx., at 14-17, and that the annual percentage rate ("APR") of interest charged for these loans ranged from 126% to 1317%, *id.*, at 16, 17. If the allegations of the Complaint are true, Petitioners are "loan sharks", as defined in section 687.071(1)(f), Florida Statutes, and are guilty of systematic felonious conduct, as defined in section 687.071(3).[8]

The Florida Supreme Court declared, as a matter of State public policy, that "there are no severable, or salvageable, parts of a contract found illegal and void under Florida law." *Cardegna*, 894 So. 2d at 864. According to the court, arbitration clauses could not be treated any differently from any other provision out of fear that it would "breath[e] life into a potentially illegal contract." *Id.*; *see also Party Yards, Inc. v. Templeton*, 751 So. 2d 121, 123 (Fla. 5th DCA 2000) ("A court's failure to first determine whether the contract violates Florida's usury laws could breathe life into a contract that not only violates state law, but also is criminal in nature, by use of an arbitration provision."), *quoted in Cardegna*, 894 So. 2d at 862.

The very act of compelling arbitration (or rather, compelling the State of Florida's courts to compel arbitration) is a direct affront to Florida public policy in any agreement that is potentially criminal. Moreover, assuming Petitioner is correct that *Prima Paint*, as applied to the States in *Southland*, dictates that arbitration provisions embedded in potentially criminal agreements are separable as a matter of federal law, it is almost

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[8] Section 687.071(3) provides, in relevant part: "Unless otherwise specifically allowed by law, any person making an extension of credit to any person, who shall willfully and knowingly charge, take or receive interest thereon at a rate exceeding 45 percent per annum or the equivalent rate for a longer or shorter period of time, whether directly or indirectly or conspire so to do, shall be guilty of a felony of the third degree . . . ."

inevitable that the substantively criminal provisions of criminal agreements will at least occasionally be enforced.

Arbitrators are not bound by comparable rules of evidence and discovery. More importantly, arbitrators have no obligation to engage in comparable fact finding, to give detailed reasons justifying their awards, or to assemble a record susceptible to meaningful appellate review. *See, e.g.*, *Wilko v. Swan*, 346 U.S. 427, 436 (1953), *overruled on other grounds*, *Rodriguez De Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989); *El Dorado Sch. Dist. #15 v. Continental Cas. Co.*, 247 F.3d 843, 848 (8th Cir. 2001); *Geneva Sec., Inc. v. Johnson*, 138 F.3d 688, 692 (7th Cir. 1998); *MCI Telecomms. Corp. v. Matrix Communs. Corp.*, 135 F.3d 27, 36 (1st Cir. 1998); *O.R. Sec., Inc. v. Professional Planning Assocs., Inc.*, 857 F.2d 742, 747 (11th Cir. 1988).

Even in cases where a meaningful record has been created, appellate courts are generally precluded from correcting errors in arbitration proceedings. "Factual error" and "legal error" are not grounds for vacatur enumerated in 9 U.S.C. § 10. Accordingly, "even where such error is painfully clear, courts are not authorized to reconsider the merits of arbitration awards." *Bull HN Info. Sys. v. Hutson*, 229 F.3d 321, 330 (1st Cir. 2000) (internal citations and quotations omitted). "As long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." *Federated Dep't Stores v. J.V.B. Indus.*, 894 F.2d 862, 866 (6th Cir. 1990); *accord, e.g.*, *Gingiss Int'l v. Bormet*, 58 F.3d 328, 333 (7th Cir. 1995) ("Factual or legal errors by arbitrators—even clear or gross errors—do not authorize courts to annul awards.") (internal quotation omitted). Petitioner and his *amici curiae* thus cannot credibly dispute that the "streamlined" fact finding, minimal record, and lack of meaningful appellate review in most arbitration proceedings

dramatically increases the likelihood that cases will be wrongly decided.

The injury to the State is in no way lessened by Petitioner's argument that Respondents voluntarily agreed to arbitrate by assenting to the agreements in question. The State must be able to create limited classes of contracts that are so offensive to public policy that they have no legal effect regardless of assent. With respect to statutes prohibiting usury, the Florida Supreme Court has declared that their purpose is "to bind the power of creditors over necessitous debtors and prevent them from extorting harsh and undue terms in the making of loans." *Chandler v. Kendrick*, 146 So. 551, 552 (Fla. 1933), *quoted in Jersey Palm-Gross v. Paper*, 658 So. 2d 531, 534 (Fla. 1995). Florida public policy is directly contravened if creditors could defeat the purpose of these statutes merely on the basis of procuring assent from "necessitous borrowers" by utilizing an advantageous bargaining position to deprive borrowers of a state court remedy due to "harsh and undue terms" embedded in the agreements they drafted.[9]

Moreover, the broad "national policy favoring arbitration" that the *Southland* majority (erroneously) concluded

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[9] Further, as Justice Black recognized in his *Prima Paint* dissent, the legislative history is crystal clear that the Congress that enacted the FAA never intended that it apply to contracts of adhesion. According to Justice Black, Senator Walsh of Montana expressed reservations,

> cit[ing] insurance, employment, construction, and shipping contracts as routinely containing arbitration clauses and being offered on a take-it-or-leave-it basis to captive customers or employees. He noted that such contracts "are really not voluntarily [sic] things at all" because "there is nothing for the man to do except to sign it; and then he surrenders his right to have his case tried by the court. . . ." He was emphatically assured by the supporters of the bill that it was not their intention to cover such cases.

Prima Paint, 388 U.S. at 414 (Black, J., dissenting) (footnotes omitted).

was "[declared by Congress] in enacting § 2 of the federal Act," *Southland*, 465 U.S. at 12, applies more broadly to the States than it does to the Federal Government. Congress is free to impose limitations on this "national policy" and exempt certain classes of contracts from the FAA in spite of it. *See, e.g.*, *Shearson/American Express v. McMahon*, 482 U.S. 220, 226 (1987) ("Like any statutory directive, the Arbitration Act's mandate may be overridden by a contrary congressional command."). As this Court has repeatedly made clear, the States are denied this privilege, *Doctor's Assocs. v. Casarotto*, 517 U.S. 681 (1996); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995); *Perry v. Thomas*, 482 U.S. 483 (1987); *Southland Corp. v. Keating*, 465 U.S. 1 (1984), even though virtually every State has enacted a statute that, like the FAA, renders arbitration agreements generally enforceable as a matter of State law.[10]

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[10]*See* §§ 682.01 to -.22, Fla. Stat.; *see also* Alaska Stat. §§ 09.43.10 to -.480; Ariz. Rev. Stat. Ann. §§ 12-1501 to -1518; Ark. Code Ann. §§ 16-108-201 to -224; Cal. Civ. Proc. Code §§ 1280 to 1294.2; Colo. Rev. Stat. §§ 13-22-201 to -223; Conn. Gen. Stat. §§ 52-408 to -424; Del Code Ann. tit. 10, §§ 5701 to 5725; O.C.G.A. §§ 9-9-1 to -18; Haw. Rev. Stat. §§ 658A-1 to -29; Idaho Code Ann. §§ 7-901 to -922; 710 Ill. Comp. Stat. 5/1 to -23; Ind. Code. Ann. §§ 34-57-2-1 to -22; Iowa Code Ann. §§ 679A.1 to -.19; Kan. Stat. Ann. 5-401 to -422; Ky. Rev. Stat. Ann. §§ 417.045 to -.240; La. Rev. Stat. Ann. §§ 9:4201 to -:4217; Me. Rev. Stat. Ann. tit. 14, §§ 5927 to 5949; Md. Code Ann., Cts. & Jud. Proc. §§ 3-201 to -234; Mass. Gen. Laws Ann. ch. 251, §§ 1 to 19; Mich. Comp. Laws Ann. §§ 600.5001 to -.5035; Minn. Stat. Ann. §§ 572.08 to -.30; Mo. Rev. Stat. §§ 435.350 to -.470; Mont. Code Ann. §§ 27-5-111 to -324; Neb. Rev. Stat. §§ 25-2601 to -2622; Nev. Rev. Stat. §§ 38.206 to -.248; N.H. Rev. Stat. Ann. §§ 542:1 to -:11; N.J. Rev. Stat. §§ 2A:24-1 to -11; N.M. Stat. Ann. §§ 44-7A-1 to -32; N.Y. C. P. L. R. §§ 7501 to 7514; N.C. Gen. Stat. §§ 1-569.1 to -.31; N.D. Cent. Code §§ 32-29.3-01 to -29; Ohio Rev. Code Ann. §§ 2711.01 to -.16; Okla. Stat. Ann. tit. 15, §§ 801 to -818; Or. Rev. Stat. §§ 36.600 to -.740; 42 Pa. Cons. Stat. Ann. §§ 7301 to -7320; R.I. Gen. Laws §§ 10-3-1 to -21; S.C. Code Ann. §§ 15-48-10 to -240; S.D. Codified Laws Ann. §§ 21-25A-1 to -38; Tenn. Code Ann. §§ 29-5-301 to -320; Tex. Civ. Prac. & Rem. Code § 171.001 to -.055; Utah Code Ann. §§ 78-31a-101 to -131; Vt. Stat. Ann. tit. 12, §§ 5651 to 5681; Va. Code Ann. §§ 8.01-581.01 to -.016; Wash. Rev. Code. §§ 7.04.010 to -.220; Wis. Stat. §§

States have no ability to curb potential abuses of arbitration because no State policy is ever sufficiently compelling to outweigh the "national policy favoring arbitration" declared by this Court in *Southland*. A great benefit of federalism is that "the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear." *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring); *see also New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("Denial of the right to experiment may be fraught with serious consequences to the Nation."). As a result of *Southland*, the laboratories are closed.

The injury to the States caused by *Southland* outweighs any reliance interest private parties might have that could justify retaining it. As twenty-five law professors persuasively argued in a brief *amici curiae* filed in support of the respondents in *Green Tree Financial Corp. v. Bazzle*, "[f]ew legitimate expectations are settled by *Southland*." Brief of Law Professors as Amici Curiae in Support of Respondents, at 17, *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003) (No. 02-634). Specifically, the professors note that the corporate drafters of arbitration agreements, rather than resting on settled expectations, "have been aggressively experimenting with arbitration agreements to find new ways to use them to limit their customers' or employees' remedies against them." *Id.* The twenty years since *Southland* have thus been characterized by "drafting parties' efforts to 'push the envelope,'" *id.*, to find new and exciting ways to defeat State consumer protection and labor laws and their attendant state-created rights and remedies.

As explained above, this case aptly demonstrates how effective a tool *Southland* has become. Florida's usury laws were designed to protect its citizens from the unscrupulous business practices of predatory lenders. On the basis of

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788.01 to -.18; Wyo. Stat. Ann. §§ 1-36-101 to -119.

Southland, Petitioner relies on its artful insertion of arbitration provisions into its boiler-plate consumer contracts to prevent Florida from enforcing this carefully calibrated consumer protection law. As explained above, *Southland*, not anything in "the FAA," denies a State's citizens access to the State's courts for adjudication of state-created rights arising out of contracts of adhesion that are themselves carefully calibrated to defeat those state-created rights.

II. *Prima Paint* does not compel enforcement of arbitration clauses embedded in criminally illegal agreements.

a. *Prima Paint* does not mandate separability of arbitration clauses under all circumstances.

The purpose of the FAA "was to make arbitration agreements as enforceable as other contracts, *but not more so*." *Prima Paint*, 388 U.S. at 404 n.12 (emphasis added). Thus while states may not "place arbitration clauses on an unequal 'footing'" with other contract provision, *Allied-Bruce*, 513 U.S. at 281, neither must they treat arbitration clauses more favorably than any other contract provision. Accordingly, nothing in *Prima Paint*, or, more importantly, in the text of the FAA or its legislative history supports the conclusion that Congress intended for arbitration clauses to be invariably separable.

The Florida Supreme Court in this case refused to enforce the arbitration clause at issue upon a ground that "exist[s] at law or in equity for the revocation of any contract," *see* 9 U.S.C. § 2; *Allied-Bruce*, 513 U.S. at 281—specifically, that no provision of a facially criminal agreement can ever be enforced, *see Cardegna*, 894 So. 2d at 864. Respondents alleged and offered evidence tending to establish that Petitioner is a "loan shark", 687.071(1)(f), Fla. Stat., guilty of systematic felonious conduct under Florida's usury laws, *see id.* § 687.071(3). The Florida Supreme Court declared, as a matter of sound public policy, that

treating the arbitration clause differently from any other provision would "breath[e] life into a potentially illegal contract." *Cardegna*, 894 So. 2d at 864.

The Florida Supreme Court's decision to treat the arbitration clause *exactly like any other contract provision* is fully consistent with the plain language of section 2 of the FAA, with *Southland*, and with every other decision in which this Court has applied "FAA preemption." Each of these decisions involved state laws that specifically targeted and disfavored arbitration clauses. *Doctor's Assocs.*, 517 U.S. at 687 (FAA preempted statutory notice requirement applicable only to arbitration clauses); *Allied-Bruce*, 513 U.S. at 269 (FAA preempted statute providing that all pre-dispute arbitration agreements were invalid and unenforceable); *Perry*, 482 U.S. 490-91 (FAA preempted statute precluding enforcement of arbitration in wage collection actions); *Southland*, 465 U.S. at 17 n.11 ("[T]he defense to arbitration found in the California Franchise Investment Law is not a ground that exists at law or in equity 'for the revocation of any contract' but merely a ground that exists for the revocation of arbitration provisions in contracts subject to the California Franchise Investment Law.").

The Court made clear in each of these cases that it was a state law's disfavored treatment of arbitration that rendered it inconsistent with section 2 of the FAA. Although discriminatory state laws were preempted, the Court explained that "the text of § 2 declares that state law may be applied 'if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.'" *Doctor's Assocs.*, 517 U.S. at 686-87 (quoting *Perry*, 482 U.S. at 493, n.9). "[A]bsent an 'unmistakably clear' expression of intent to 'alter the usual constitutional balance between the States and the Federal Government,' . . . a statute [should be interpreted] to preserve rather than destroy the States' substantial sovereign powers." *Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 208-09

(1998) (quoting *Gregory*, 501 U.S. at 460-61); *see also* discussion *supra* § I.a.

Here, the Florida Supreme Court's conclusion that "there are no severable, or salvageable, parts" of a criminally illegal agreement, *Cardegna*, 894 So. 2d at 864, is, indisputably, a nondiscriminatory "law [that] arose to govern issues concerning the validity, revocability, and enforceability of contracts generally," *Perry*, 482 U.S. at 492, n.9. Nothing in *Prima Paint* prevents states from depriving parties of all rights under an illegal contract. The FAA does not therefore prohibit states from refusing to enforce any provision in an illegal contract as a matter of sound public policy designed to protect consumers and provide a sanction to deter unlawful conduct. To hold otherwise would be to infringe impermissibly on state sovereignty.

"[A] contract the terms of which themselves are contrary to public policy" is "totally void, i.e., without any legal effect." *Oubre v. Entergy Operations*, 522 U.S. 422, 431 (1998) (Breyer, J., concurring) (citing Restatement (Second) of Contracts § 7 cmt. a). The States have always been free to create public welfare laws and to prevent enforcement of agreements that violate those laws. Accordingly, Congress could not possibly have intended that the "making of [an] agreement for arbitration" not be "in issue," 9 U.S.C. § 4,[11] when it is part and parcel of an agreement that is criminally illegal under governing state law.

Relying on *Prima Paint*, and the subsequent circuit court decisions purporting to apply *Prima Paint* to illegal contracts, Petitioner attempts to characterize the arbitrability issue as simply a matter of rigorously enforcing private agreements. "After all," Petitioner notes, "'[t]he liberal federal policy

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[11] The textual basis for the *Prima Paint* separability rule is section 4 of the FAA, which, by its clear terms, applies only in federal court proceedings. *See* discussion *infra* § II.b.; *compare Southland*, 465 U.S. at 10 ("Congress withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration . . . *[i]n enacting § 2 of the [FAA].*") (emphasis added).

favoring arbitration agreements . . . is at bottom a policy guaranteeing the enforcement of private contractual arrangements,' and 'as with any other contract, the parties' intentions control.'" Brief For Petitioner at 21 (quoting *Mitsubishi Motors*, 473 U.S. at 625). But the issue here transcends the mere intention of the parties.

In Florida, as in every other State, parties are generally free to dictate the terms of their contractual relationships. However, freedom of contract principles must and do occasionally yield to countervailing health, welfare, and safety concerns of the States. Where, pursuant to controlling state law, an illegal contract is not a contract, there is likewise no agreement to arbitrate which ever came into existence. Accordingly, the "making of [an] agreement for arbitration" must be at issue if the arbitration clause is contained in an illegal agreement that violates governing state law. If it were otherwise, private parties would have unlimited license to trump public welfare laws in the context of arbitration. In short, nothing in the FAA or *Southland* or *Prima Paint* forces States to "breath[e] life into . . . potentially illegal contract[s]," *Cardegna*, 894 So. 2d at 864, irrespective of whether the parties voluntarily agreed to break the law.

Often state contract law is the principal means by which the State can protect consumers from commercial enterprises that seek to take advantage of unequal bargaining positions. For example, the purpose of Florida's usury laws is "to bind the power of creditors over necessitous debtors and prevent them from extorting harsh and undue terms in the making of loans." *Chandler v. Kendrick*, 146 So. 551, 552 (Fla. 1933), *quoted in Jersey Palm-Gross v. Paper*, 658 So. 2d 531, 534 (Fla. 1995). States have a compelling interest in policing these contractual relationships to help level the playing field between consumers and commercial parties. The Court should not hold that commercial parties can circumvent a state's consumer protection

laws merely through the artful insertion of an arbitration clause in its contracts of adhesion.

The allegations at issue in *Prima Paint*, fraudulent inducement, relate solely to the particular aspects of the bargaining process between the parties. By contrast, the allegations herein of criminal illegality involve the overriding interests of the State in public welfare and consumer protection. The analytical focus shifts away from the specific parties to the particular contract and lands squarely within the arena of permissible state public policy. This Court could not possibly have intended the holding in *Prima Paint* to inhibit the States' sovereign authority to police criminally illegal contracts.

b. The *Prima Paint* separability rule applies only in federal court proceedings.

Even if this Court were to conclude *Prima Paint* requires separability of an arbitration clause under all circumstances, including where such clause is imbedded in an illegal contract, the rule would nevertheless apply only in federal court. The holding of *Prima Paint*—that federal courts lack jurisdiction to consider whether a contract containing an arbitration clause had been induced by fraud before compelling arbitration, unless the claim was directed at the arbitration clause itself—rested principally on its construction of *sections 3 and 4 of the FAA*. *Prima Paint*, 388 U.S. at 405-07. Sections 3 and 4 set forth the *procedural mechanisms* through which the *federal courts* must enforce arbitration agreements subject to the Act. By the clearest of terms, sections 3 and 4 do not apply in state court proceedings.

Section 3 creates a stay of proceedings mechanism for suits "brought in any of the courts of the United States." 9 U.S.C. § 3. The phrase "courts of the United States" used in a federal statute refers to Article III courts and certain Article I courts created by Congress, but not to state courts. *See* 28 U.S.C. § 451 (defining "court of the United States" as used in chapter 28); *see also Southland*, 465 U.S. at 29 (O'Connor, J.,

dissenting) ("§ 3's 'courts of the United States' is a term of art whose meaning is unmistakable. State courts are 'in' but not 'of' the United States."), *cited in Volt*, 489 U.S. at 477 n.6. Section 4 provides a mechanism by which "[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition *any United States district court* . . . for an order directing that such arbitration proceed in the manner provided for in such agreement." *Id.* § 4 (emphasis added).

The separability principle announced in *Prima Paint* was entirely dependent on its construction of sections 3 and 4. In rejecting the First Circuit's conclusion "that the question of 'severability' is one of state law" in diversity proceedings, the Court explained that section 4 "provided an explicit answer"—but only "[w]ith respect to cases brought in federal court involving maritime contracts or those evidencing transactions in 'commerce.'" *Prima Paint*, 388 U.S. at 403. Section 4 provides, in relevant part, that a federal court may compel arbitration once it is satisfied that "the making of the agreement for arbitration . . . is not in issue." 9 U.S.C. § 4, *quoted in Prima Paint*, 388 U.S. at 403. Construing the language of section 4, the Court held that a claim of fraudulent inducement does not place "the making of the agreement for arbitration . . . in issue" unless "the claim is fraud in the inducement of the arbitration clause itself." *Prima Paint*, 388 U.S. at 403-04. Accordingly, the Court held that "in passing upon *a § 3 application for a stay* while the parties arbitrate, *a federal court* may consider only issues relating to the making and performance of the agreement to arbitrate." *Prima Paint*, 388 U.S. at 404 (emphasis added).

The Court in *Prima Paint* concluded Congress had the authority to create the separability rule in federal court because "the question is whether Congress may prescribe *how federal courts are to conduct themselves* with respect to subject matter over which Congress plainly has power to legislate." *Prima Paint*, 388 U.S. at 405 (emphasis added). Neither Congress, in

the FAA, nor this Court in *Prima Paint*, sought to prescribe analogous rules for state courts.

CONCLUSION

For the foregoing reasons, the decision of the Florida Supreme Court should be affirmed.

RESPECTFULLY SUBMITTED,

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